INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	2
Argument	6
Conclusion	9

CITATIONS

Cases:

Friedberg v. *United States*, 348 U.S. 142	6, 7
Holland v. *United States*, 348 U.S. 121	6, 7

Statute:

Internal Revenue Code of 1939, Sec. 145(b) (26 U.S.C. 1952 ed., Sec. 145(b))	2

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 168

HARVEY N. MIGHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. A1-A7) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 17, 1956. (Pet. A1.) The petition for a writ of certiorari was filed on June 15, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the evidence of attempted evasion of income taxes was sufficient to sustain the jury's verdict.

2. Whether in its investigation of petitioner's opening net worth, the Government failed to follow leads which would have tended to support petitioner's defense.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> * * * * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

STATEMENT

On April 3, 1954, petitioner was indicted in the United States District Court for the District of Kansas on four counts of willful attempt to evade income taxes by filing and causing to be filed fraudulent returns in violation of Section 145(b) of the Internal Revenue Code of 1939. The amounts of income and the taxes

due thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 3-6):

		Reported		Corrected	
		Income	Tax	Income	Tax
Count I	(1947)	$36,940.60	$15,244.07	$52,144.35	$25,235.73
Count II	(1948)	4,255.17	208.36	72,441.95	28,475.29
Count III	(1949)	4,043.59	73.64	8,564.45	850.78
Count IV	(1950)	2,936.70	–0–	36,886.04	10,017.14

After a jury trial lasting eight days, petitioner was found guilty as charged (R. 220), and on March 11, 1955, he was sentenced to imprisonment for a period of two years on each count, all terms of imprisonment to run concurrently. On Count I, petitioner was fined $3,000. (R. 222-223.) The Court of Appeals affirmed. (Pet. A1-A7.)

In 1947, petitioner had income from the illegal sale of liquor. During the prosecution years he also had income from farming, oil, hotel and cafe partnerships, and gambling. (Exs. 1-4, E; R. 10, 71, 73, 77, 125, 167, 190, 203, 225-255, 292.) The Government's case was based upon the net worth method of proof. Both questions presented relate to the adequacy of the starting-point evidence to show that the increases in petitioner's net worth during the years 1947, 1948, 1949 and 1950 could not have resulted from the investment of previously accumulated cash funds and working capital. The evidence to support the verdict may be summarized as follows:

In 1921, at the approximate age of nineteen years (Ex. E; R. 167, 292), petitioner went to work as a mechanic. From 1921 to 1928, he earned an average of $110 per month. Between 1929 and 1938, he was a farm laborer, a mechanic and a tinsmith. From

1938 to April, 1940, he served a sentence in the Iowa State Penitentiary. Some time during 1940, he was divorced from his first wife, in which proceeding there was no property settlement and no alimony award. According to his parole reports, between April, 1940, and May, 1941, he worked on his father's farm for $20 per month. The report for May, 1941, showed that he had accumulated $316 in wages due him and that he had cash on hand of $1. Each monthly report bore the admitted signature of petitioner. During this time he reportedly received from his mother small amounts of money—from $2 to $10—which she would give him so that he could go to see her at Clear Lake, Iowa. A 1941 investigation by the Alcohol Tax Unit of the Internal Revenue Department in Iowa found no assets of petitioner.[1] (Exs. 30, E; R. 29, 30, 94, 117, 167, 260, 293, 303; Pet. A3.) On November 14, 1941, he placed a $414.30 chattel mortgage on a 1941 Ford automobile, which amount was paid in 1942. (R. 34.)

During March and April, 1942, he worked for the Cessna Aircraft Company for 60 cents an hour. (R. 29-30.) During nearly the last six months of 1942, he was serving a Missouri sentence for transportation of liquor and had no earnings. (R. 195, 201; Pet. A4.) In 1943, he engaged in the transportation and sale of liquor. (R. 190.) In 1944, when he purchased a personal residence in Russell, Kansas, he mortgaged it for $5,000. (Ex. 91; R. 34-35, 44, 99, 118, 267.) His first federal income tax return was filed in 1943. For the years 1943, 1944, 1945 and 1946, petitioner reported income amounting to approximately $57,000. (Exs. 5, 7-9, E; R. 10, 117, 167, 257-258, 303.)

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[1] It appears that late in 1941 petitioner was employed as a driver by a bootlegger. (R. 117.)

Petitioner was married to his second and present wife in December, 1942. (R. 190.) In 1942 and 1943, she worked for wages at Douglas Aircraft and Dorrance Cafe. Her First Federal income tax return was filed in 1942, showing income of less than $2,400. (R. 196.) She testified that at the beginning of 1943 her assets amounted to about $1,000. (R. 195.)

It was found that neither petitioner nor his wife had acquired any substantial gifts, loans or inheritances. (R. 94-98.)

The Government's evidence showed that the net worth of petitioner and his wife was only $4,300 at the end of 1943; that it had increased to $123,318.01 by the end of 1946 (the beginning of the prosecution years); and that by the end of 1950 it was $233,803.58. These increases, when combined with petitioner's non-deductible expenditures, indicated a total *unreported* income of $204,645.28 during the years 1944 through 1950, of which $116,670.37 was realized during the prosecution years. (Exs. 91, 92; R. 99, 108, 267-269.)

During the investigation, petitioner told the Treasury agents that he had had $116,000 of cash on hand at the end of 1947, representing his life savings,[2] but he refused to disclose the source of the alleged hoard on the ground that to do so might tend to incriminate him. He claimed that the hoard was known to his mother and father—both of whom were dead—and to his wife; and that, although his son had seen him count $50,000 in cash about 1945, "I don't think he will answer any questions for you." (Ex. E; R. 167, 302-304.) Petitioner did not take the witness stand at the trial, but

[2] Petitioner and his representatives arrived at the $116,000 figure by assuming that the returns were correct as filed and simply totaling the expenditures made by petitioner in excess of his reported income. (R. 116, 172-174.)

his wife testified that she had married petitioner late in 1942; that, early in 1943, he had turned over $114,000 in cash to her for safe-keeping; that this was exclusive of liquor inventory; and that she did not know where he had obtained the money and had never asked him. (R. 190-191, 195-196.)

ARGUMENT

1. Petitioner's contention that the evidence was insufficient to take the case to the jury centers on the alleged shortcomings in the proof of starting-point net worth. (Pet. 5-8, 11-17.) Petitioner relies heavily (Pet. 3-5, 6, 15-16) on defense testimony as to the existence of a large prior cash accumulation, all of which may be assumed to have been rejected by the jury, and discounts (Pet. 12) the weight of a portion of the Government's starting-point evidence. But plainly the issue here is whether there is substantial evidence to fix the opening net worth with reasonable certainty—evidence from which the jury might properly have inferred that the alleged cash hoard did not exist. *Holland* v. *United States*, 348 U.S. 121, 132; *Friedberg* v. *United States*, 348 U.S. 142, 144. We think there can be no doubt that the instant case meets this test. The Government's evidence showed a painstaking investigation into petitioner's financial history. It demonstrated that between 1921 (when he was 19 years old) to 1938 he was employed in menial jobs at low wages; that from 1938 to 1940 he served a prison sentence; that there was no property settlement and no alimony awarded at the time of his divorce in 1940; that as late as 1942 he was working for 60 cents an hour and had a chattel mortgage on his car; that he had never filed a federal income tax return until 1943;

and that he had never received any substantial gifts or inheritances. (*Supra*, pp. 3-5.) From this evidence "the jury could readily have concluded that petitioner had saved no such reserve" (*Friedberg* v. *United States*, *supra*, p. 144) by the end of 1943 as he claimed; and that his net worth at that time was not substantially greater than the $4,300 unearthed by the investigation. The inference is bolstered by petitioner's refusal to disclose the source of the alleged $116,000 of cash on hand and by his wife's professed ignorance of its source. (*Supra*, pp. 5-6.)[3]

The contention (Pet. 6-7) that the "government proved the existence of a buried hoard of cash" relates to $8,800 of deteriorated currency turned in to a bank for redemption by petitioner's wife in July, 1950 (R. 54-55). Possession of such an amount in 1950 is plainly consistent with the Government's theory of the case (1950 being the last prosecution year) and hardly proves the possession of $115,000 in 1943.

2. Petitioner contends (Pet. 3, 8-10, 17) that the Government failed to follow leads furnished by him which, if investigated, would have disclosed the existence of a substantial cash hoard and liquor inventory on hand at the beginning of the prosecution years. See *Holland* v. *United States*, 348 U.S. 121, 135-136. As we have shown (*supra*, p. 5), petitioner's refusal to disclose the source of the alleged cash hoard rendered that "lead" not "reasonably susceptible of being

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[3] It should be noted that, even if petitioner did possess the claimed cash hoard in 1943 (R. 190-191), it would have been exhausted by early 1948 if applied to the excessive net worth increases and expenditures in the interim. The Government's computations showed unreported income of $110,514.38 for the years 1944 through 1947. (Exs. 91, 92; R. 99, 108, 267-269.)

checked" (348 U.S., p. 136); certainly the Government's inquiry into his financial history was as complete as it reasonably could be and strongly tended to show that the "lead" was false.[4] As for the alleged liquor inventory, the petition fails to point out any occasion, before trial, upon which such a contention was advanced. The argument is (Pet. 8) that the Government should have known, in view of the nature of the illegal liquor business, that there must have been an inventory on hand at the end of 1946. We think the Court of Appeals was right in concluding that it is more likely that petitioner did not keep "on hand in dry territory, where it was subject to confiscation, large quantities from which to make deliveries" and that "the question at best was for the jury" (Pet. A5). This conclusion is supported by the testimony of petitioner's wife that "*At times* we had inventory on the floor" (R. 190; emphasis added), and by the fact that no inventory is shown on the pertinent income tax returns (Exs. 1, 8, 9; R. 10, 229, 257-258). Finally, the record affirmatively shows that petitioner had destroyed all the records relating to his liquor business prior to the Treasury investigation in order to prevent their falling into the hands of law enforcement officers. (R. 13, 82.) Even if petitioner had claimed a liquor inventory, it would hardly have been possible for the agents to verify its existence or to estimate its value.[5]

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[4] As noted above (p. 5), petitioner advised the agents that the existence of the cash was known to his mother, father, wife and son, but that the mother and father were not living, and that he did not think his son would "answer any questions for you."

[5] The extreme unlikelihood that omission of the alleged inventory could have substantially changed the result should be noted. Petitioner claimed during the investigation that he had $116,000 of cash on hand at the end of 1947 (Ex. E; R. 167, 302), *i.e.*, after

The trial court was well aware of the Government's obligation to track down relevant leads furnished by the taxpayer and reasonably susceptible of being checked, and so instructed the jury. (R. 217.) The verdict reflects the jury's satisfaction that the Government carried out its duty.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
RICHARD B. BUHRMAN,
DICKINSON THATCHER,
Attorneys.

JULY, 1956.

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liquidation of the inventory (R. 191-192). His wife testified, however, that he had $114,000 of cash on hand in 1943, exclusive of the inventory. (R. 190-191, 195.) Clearly, the gist of the defense was that the alleged accumulation of wealth which became visible during the years 1943-1950 was complete by 1943. Conversion of cash to liquor in 1943-1947 and back to cash late in 1947 could have no effect on unreported income for any year. This is a sufficient answer to petitioner's complaint (Pet. 8-10) that the agents should have questioned him about the year 1947, specifically his opening net worth. If, as the defense evidence shows, the accumulation was complete by 1943, it could make no difference whether petitioner was questioned about the years 1948-1950 or the years 1947-1950.

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